DEC 17 1993

No. 93-724

In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The D.C. Circuit has ordered a federal district court to enforce the child-abuse-and-neglect laws of the District of Columbia and to supervise the District's management of its foster-care system under these local laws. The Honorable Thomas F. Hogan now acts as a federal adjunct to the independent judicial system of the District of Columbia and as an overseer of litigation in that forum. The D.C. Circuit has ordered these actions even though (1) it declined to find that there was any federal interest in this case; (2) Congress has given the District of Columbia judiciary exclusive jurisdiction of neglect and adoption matters; (3) family-law matters are matters of vital local concern; (4) Judge Hogan himself declined to exercise pendent jurisdiction in this case; and (5) the D.C. Circuit's decision encroaches on the power of the District's independent judiciary to interpret and apply local law.

Despite these facts, respondents would have this Court believe that the D.C. Circuit's decision constitutes "business as usual" in a federal court. Nothing could be further from

the truth. Respondents also suggest that this Court should ignore the important issues presented by this case because children in the District's foster-care system are victims of constitutional violations. The D.C. Circuit, however, declined to make any such ruling. Finally, respondents offer a number of other reasons why this Court should not review the decision below. None of them withstands scrutiny.

I. THIS CASE CONCERNS CHILD-CUSTODY DECISIONS

Respondents assert that the District is "misleading" this Court by its argument "that this case concerns issues of child custody, of whether children should be left at home or removed from their parents, and of whether parental rights should be terminated in individual cases so that children can be legally freed for adoption." Opp. 10-11. Respondents admit, however, that such decisions "are difficult, subjective decisions that should be left to the discretion of individual caseworkers in the District of Columbia and to its courts." Opp. 11.

Respondents' assertion that this case does not concern difficult, subjective child-custody decisions is contradicted by the opinions below, the arguments they have made in this litigation, and the evidence they introduced at trial in support of their claims that the District's child-neglect and foster-care system is legally deficient.

A. The Opinions & Legal Arguments Below.

The Opinions below themselves demonstrate that this case does involve child-custody decisions that traditionally have been made by specialized local family law courts. As the D.C. Circuit and Judge Hogan ruled, the District's "transgressions" in this case include " 'the failure to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, . . . and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption' " Pet. App. 3a, quoting Pet. App. 17a. See also

Pet. App. 47a (the rights of Demerick B.'s mother should have been terminated years ago to permit him to realize his right to be adopted).

Respondents' position here is also contradicted by the positions they have taken elsewhere in the course of this litigation. As recently as November 10, 1993, for example, Marcia Robinson Lowry, counsel for respondents, in a hearing before Judge Hogan on the permissible scope of the remedial decree following the D.C. Circuit's liability decision, was pleased to inform him that the decision did not require alteration of any part of his prior remedial decree governing adoption. She stated: "[T]he Court of Appeals could have conceivably, although I think not in reality, ruled that adoption was not within the subject matter jurisdiction of this Court, in which case that provision of the order would not be in effect." Transcript 19. Earlier, Elizabeth S. Symonds, also counsel for respondents, urged that the conduct of child-custody litigation in the District of Columbia Court of Appeals is subject to Judge Hogan's oversight. In an appeal filed by the mother of Demerick B., one of the named plaintiffs, she challenged the adoptive status of her child on due process grounds, and Ms. Symonds urged that Judge Hogan's order required the District's appellate attorneys to take action to ensure his prompt adoption. See Dist. Reply Br. (D.C. Cir.) App. A.[1]

B. Respondents' Own Evidence At Trial.[2]

Respondents' own evidence at trial also demonstrates that this case involves child custody matters that are the *raison*

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[1] According to Ms. Symonds, "Because Judge Hogan's order in *LaShawn* contains explicit provisions designed to ensure the well-being of the named plaintiffs, we believe that the District must give this matter high priority and devote appropriate legal resources to ensuring that this appeal is disposed of quickly and that Demerick's adoption is promptly finalized."

[2] This evidence came from respondents' experts, Clarice Dibble Walker, then an Associate Professor, Howard University School of Social Work; and Dr. William B. Clotworthy and Dr. Harold Eist, child psychiatrists. Professor Walker is now employed by the District and is a petitioner in this Court.

d'etre of the District's family law court. This point is illustrated by the following summary of respondents' evidence concerning Kevin E., a named plaintiff, who was found to be "representative" of the class. Pet. App. 25a.

Kevin's mother was 15 years old when she gave birth to him in August 1979. As an adolescent, she had spent three years in St. Elizabeths Hospital, a mental institution, and, after Kevin was born, she was again admitted several times.

Prior to Kevin's birth, his mother had decided to put him up for adoption but she changed her mind. She was unable to bring Kevin home, however, because her own father, with whom she lived, would not permit it. As a result, the District assumed custody of Kevin and placed him in the care of St. Ann's Infant and Maternal Home. Kevin remained at St. Ann's for a little over a year and, on September 8, 1980, he was placed with a family who planned to adopt him. Kevin remained with this family for two years until his foster parents' marriage fell apart. After being placed in another foster home for six weeks, he was placed with his mother in a home for teenage mothers and their children. His mother was unable to care for him even in this setting. Kevin, then three years old, was placed in another adoptive home where he remained for four years. During this time, he received psychotherapy as well as medication to control the Attention Deficit-Hyperactivity Disorder with which he was born. At the age of seven, Dr. Clotworthy testified, Kevin's "foster home gave up on him, asked him to be removed, and added insult to injury by saying they were going to adopt another foster child . . . living with them at the same time Kevin lived with them." The District again found an adoptive home for Kevin where he remained for a year and one-half, when his foster parents asked that he be removed and told him that they were going to adopt another child who had been living with them.

Kevin became psychotic. The District sent him to Children's Hospital and to St. Elizabeths Hospital for treatment. Kevin was then moved to "Villa Maria, a residential treatment center in Baltimore, the most extensive kind of

therapeutic intervention there is except for hospitalization." According to Dr. Clotworthy, "Villa Maria has helped him . . . [s]o he was in good shape when I saw him."

At trial, Professor Walker criticized the District for placing Kevin at St. Ann's. Dr. Clotworthy, in turn, criticized the District for placing him in an adoptive family when he was 13 months old: Unless the District had been able to place him with a foster family before he was six months old, Kevin should have remained at St. Ann's until he was two or two-and-one-half years old to ensure constancy in his care. Furthermore, although it was recognized that Kevin had low self-esteem when he was four years old, there was a nine-month delay in securing medication for Kevin and a year's delay in securing psychiatric help.

There were other criticisms. Professor Walker faulted the District for not making "consistent efforts to ensure" that Kevin was placed in an adoptive home. Dr. Clotworthy criticized the District for allowing Kevin's mother to visit him. These visits, as did his brief stay with his mother, raised false hopes that they would be reunited. In Dr. Clotworthy's view, Kevin would have been better off had his mother's "rights been terminated years before." "Indeed," stated Dr. Clotworthy, "I think that the law puts far too much emphasis on the rights of the parents."

In short, respondents' own evidence demonstrates that this case does involve difficult, subjective decisions concerning the custody and care of children whose parents, at any particular time, may not be capable of caring for them, willing to care for them, or both. This evidence also demonstrates that the claims of the children in this case who are parties to ongoing proceedings in the Family Division are claims that may be heard in the Family Division.[3] See Pet. 4-7.

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[3] The evidence concerning Kevin, which is typical of the evidence in this case, also makes clear that, even when the hindsight (and conflicting) opinions of respondents' experts are considered, Judge Hogan erred in ruling that the District operated its foster-care system in an unconstitutional fashion.

II. REVIEW OF THE D.C. CIRCUIT'S *YOUNGER* ABSTENTION RULING IS NECESSARY AND APPROPRIATE.

A. *Younger* Abstention Is A Flexible Concept.

Respondents seek to distinguish *Younger v. Harris*, 401 U.S. 37 (1971), and *Moore v. Sims*, 442 U.S. 424 (1979), on the ground that, in contrast to those cases, they "sought injunctive relief against executive branch officials to assure executive-branch compliance with statutory and constitutional obligations imposed upon these officials." Opp. 14. *Younger* and *Moore* are not distinguishable on that ground.

In *Younger*, the federal plaintiffs brought suit solely against an executive branch official — a state prosecutor — seeking to ensure compliance with what they believed to be their constitutional rights. In *Moore*, the federal plaintiffs sought to enjoin the Texas Department of Human Resources (and other unspecified defendants) seeking to ensure compliance with what they believed to be their constitutional rights. Here, the federal plaintiffs sought to enjoin the District's chief executive official, its Mayor, and officials of its Department of Human Services ("DHS") to ensure compliance with what they believed to be their legal rights.

Younger and *Moore*, far from announcing a rigid, narrow concept of abstention, recognize that federal-court injunctions against state executive officials at the behest of persons who are parties to local court proceedings can present unacceptable risks to the fair and orderly disposition of disputes by local court systems. These cases require a federal court to stay its hand when it is asked to consider federal (and *a fortiori* local) claims asserted by children who are parties to proceedings in the Family Division of the District's Superior Court where they have an opportunity to raise these claims.[4]

[4] Respondents also assert that the District has limited its abstention argument to their federal constitutional claims and that this approach undermines its abstention argument because it would require a federal district court to "split" their federal claims. Opp. 12 n.11. This assertion is wrong. See Pet. 24 n.12. *See also Winston*, *infra*, 948 F.2d at 1401 n.10 (a federal court may have to abstain under *Moore* from deciding federal statutory challenges that may be raised in ongoing state court proceedings) (Garth, J., dissenting).

B. Respondents Have Not Demonstrated That District Law Bars Them From Raising Their Constitutional Claims.

Respondents emphasize that the D.C. Circuit found that "'[e]very claim supported by federal law is also supported by District law.' " Opp. 18, quoting Pet. App. 9a. At the same time, however, they urge that abstention is not required with respect to children subject to the protection of the Family Division because these children do not have the opportunity to raise their federal claims in that court. The latter assertion is plainly wrong.

This Court has ruled that state-court litigants may invoke a federal forum only if they demonstrate that a state rule bars them from presenting their federal claims in ongoing state proceedings to which they are parties. *See, e.g., Moore, supra*, 442 U.S. at 430; *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Here, however, those respondents who are parties to Family Division proceedings have merely asserted that their constitutional claims may not be raised in that forum. They have not cited a single District rule that bars litigation of these claims in the Family Division.[5] Nor, despite four years of litigation and the fact that all children protected by the Family Division are members of the class here, have they identified a single case in which the Family Division has ruled that a constitutional claim made here could not be raised there or offered a single concrete example of such a claim made here that could not have been raised there.

Furthermore, the local trial court cases found by the D.C. Circuit do not demonstrate that District law bars parties to neglect and related proceedings from raising in those proceedings the issues raised here, *e.g.*, whether they have a right to remain with, or be returned to, their parent(s). The first case (*In re N.P. and L.W.* (1982)) merely states the unexceptional proposition that neglect proceedings " 'center[] on

[5] The absence of a class action device in the Family Division, by which individual constitutional claims may be aggregated, obviously does not bar litigation of those claims. *See Gen'l Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

the care of a child by his or her parent' " and extend to " 'related matters involving the same family or household,' " but not beyond that point. Pet. App. 6a-7a. The second case (*In re Brim* (1984)) merely states that the Family Division is not a proper forum for raising a claim that DHS has mishandled Social Security Disability payments it has collected on behalf of a neglected child. Pet App. 7a. However, despite all the District's alleged failings, there is no such claim here.

C. Importance of *Younger* Abstention Issue.

Respondents, without addressing the decisions of the Sixth and Eighth Circuits, which the District cited as being in conflict with the decision below (Pet. 18-20), nevertheless urge that the federal courts have uniformly ruled that *Younger* abstention is not required in a case like this. In support of this claim, they cite one appellate decision, *Winston v. Children and Youth Services*, 948 F.2d 1380 (3rd Cir. 1991), *cert. denied*, 112 S. Ct. 2303 (1992).

Winston, however, does not support respondents' claim. In *Winston*, the state prevailed on the merits after trial in a case challenging, on federal constitutional and statutory grounds, parental visitation policies for children found by the local family law court to be neglected. On appeal by the parents, the court, in a two-to-one decision, held that the state had waived its abstention argument by failing to take a cross-appeal. Here, of course, the District took an appeal.[6]

III. THE ISSUE OF PENDENT JURISDICTION IS PROPERLY BEFORE THIS COURT.

Respondents wrongly claim that the issue of pendent jurisdiction is not properly before this Court. Opp. 19.

The District dealt with the issue of a private right of action under local law on appeal. Thus, respondents, although not taking a cross-appeal, urged the D.C. Circuit to abstain from

[6] On the merits of the abstention argument, the District refers the Court to Judge Garth's dissent in *Winston* for a reasoned and persuasive analysis of why abstention is required in a case like this one. *See* 948 F.2d at 1396-1401.

deciding the federal statutory issues and to affirm that aspect of Judge Hogan's decision on District-law grounds.[7] They urged that Judge Hogan had exercised pendent jurisdiction and that the District had conceded local-law violations. Respondents appeared to assume, however, that mere violations of District law were sufficient to permit affirmance and addressed the issue of a local private right of action only in a footnote. Respondents took this approach even though one major issue on appeal was whether *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), which plainly distinguishes between statutory violations and violations of rights, barred their federal statutory claims.

In its Reply Brief, the District urged that Judge Hogan had not exercised pendent jurisdiction and that the court should not affirm on local-law grounds because such matters "plainly belong not in a federal court but in the courts of the District of Columbia." Dist. Reply Br. 8. At oral argument, the debate continued over whether there was a local-law basis for Judge Hogan's decision. The District urged:

> The District laws in . . . the mind of the court below, set local law standards, but were not said to be privately enforceable rights, and in fact, if he did state those to be privately enforceable rights, then that is a compelling reason to have abstained in this case because the local courts have not decided whether the District laws provide a right of —

Transcript of Oral Argument 8 (Nov. 4, 1992).[8]

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[7] Somewhat ironically, the *Winston* case cited by respondents would have barred them from raising their pendent jurisdiction argument below because they failed to take a cross-appeal and would bar them from raising their waiver argument here because they did not file a protective cross-petition in this Court.

[8] On rebuttal, the District reiterated this point:

> [Judge Hogan] obviously didn't want to enter an injunction based upon a local statute. He did not purport to decide whether there was a privately enforceable local right under the law. . . . [T]he local courts have not decided that, in fact, there are enforceable rights under Title VI by private parties. That has not been decided, and Judge Hogan did not purport to decide it . . .. This is a local law issue, and it is a case of first impression and should be decided by the local courts.

Transcript of Oral Argument 37.

The D. C. Circuit ruled that Judge Hogan had not exercised pendent jurisdiction; it declined to accept respondents' waiver argument; and it ruled that District law creates rights as part of its exercise of pendent jurisdiction. App. 9a-13a. Whether the D.C. Circuit properly exercised pendent jurisdiction is, therefore, properly before this Court.

Furthermore, the issue would have been properly before this Court even if the District had not addressed the matter below. This Court has ruled that, when a claim is properly before an appellate court, "the court . . . retains the independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2178 (1993) (a federal appeals court properly decided statutory issue even though the issue was not raised in the district court or in the briefs and oral argument on appeal). Because the D.C. Circuit independently could have examined the law governing pendent jurisdiction, its decision is reviewable here.

CONCLUSION

The D.C. Circuit has usurped the authority of the courts of the District of Columbia to interpret and enforce District law in an area of vital local concern. It has also wrongly denigrated the ability of the District's courts to decide constitutional claims arising from child-custody arrangements subject to Family Division oversight. This Court should grant review to ensure that the D.C. Circuit acts in accordance with the decisions of this Court.

Respectfully submitted,

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